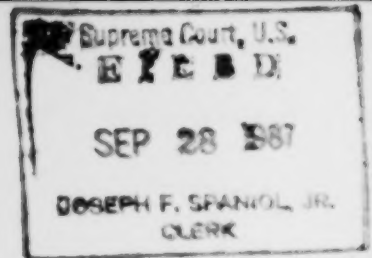


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NO.

IN THE SUPREME COURT OF THE UNITED

STATES

OCTOBER TERM, 1987

TWO PARCELS OF LAND, etc.;

ELIOT HAGAR,

PETITIONER

v.

NATIONAL RAILROAD PASSENGER
CORPORATION

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

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98pb

QUESTIONS PRESENTED

1. Can a private company, which is delegated a limited power of eminent domain by the Congress of the United States, legally extend that power by the simple expedient of "reserving" a permanent easement over lands condemned for purposes not authorized or within the delegated power.

2. When the pleadings, answers to interrogatories, and admissions on file in this case explicitly show that there are genuine issues of fact, did the Court of Appeals improperly affirm a cross-motion for summary judgment holding that the condemnor was entitled to a judgment as a matter of law.

3. Does the Court of Appeals decision in this case, that state law was not applicable in the trial on just compensation, conflict with the decision in the Fifth Circuit and with its own decision in Winooski Hydroelectric Co. v. Five Acres of Land, 769 F.2d 79 (2d Circ. 1985).

TABLE OF CONTENTS

	Page
Questions Presented.....	i
Table of Authorities.....	iv
Opinions Below.....	2
Jurisdiction.....	2
Constitutional and Statutory Provisions Involved.....	3
Statement of the Case.....	6
Reasons for Granting the Petition..	21
Conclusion.....	39
Appendix A.....	A-1
Appendix B.....	B-1
Appendix C.....	C-1

TABLE OF AUTHORITIES

CASES:

PAGE

<u>Austin v. Tennessee</u>	
179 U.S. 343.....	23,24
<u>Celotex Corp. v. Catrett</u>	
477 U.S. , 91 L.Ed.2d	
265.....	32,33
<u>Commonwealth v. Bishman</u>	
138 Penn. St.	24
<u>Cook v. Marshall County, Iowa</u>	
196 U.S. 261.....	23,24,25
<u>Georgia Power v. Sanders</u>	
617 F.2d 1112.....	34
<u>New York, N.H. v. Armstrong,</u>	
92 Conn. 349, 102 A.791.....	26,27
<u>Winooski v. Hydroelectric Co.</u>	
<u>v. Five Acres of Land</u>	
769 F.2d 79.....	ii,34
<u>Wood v. National R.R. Pass Corp.</u>	
341 F. Supp. 908.....	29

Constitution, Statutes:

United States Constitution

Fifth Amendment.....	3
45 U.S.C. Sec. 545(d).....	3,6,7,11
	14,22,37
45 U.S.C. Section 547.....	12
Conn. Gen. Stats. Sec.48-24.....	
	5,28,34

Miscellaneous:

Fed. R. Civ. P. 71A(e).....	13
Fed. R. Civ. P. 71A(2).....	18

IN THE SUPREME COURT OF THE UNITED
STATES
OCTOBER TERM, 1987

TWO PARCELS OF LAND, ETC.;
ELIOT HAGAR,
PETITIONER

v.

NATIONAL RAILROAD
PASSENGER CORPORATION,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

The owner of two parcels of land,
subjected to a partial taking by
respondent railroad, petitions for a
writ of certiorari to review the
judgment of the United States Court of
Appeals for the Second Circuit in this
case.

The practice is to entitle the
condemnation action as to the

defendants with a general description of the real property taken, and in this case the full caption would read as to the real property:

TWO PARCELS OF LAND: ONE 1691 SQ. FOOT MORE OR LESS PARCEL OF LAND IN THE TOWN OF NEW LONDON, COUNTY OF NEW LONDON AND STATE OF CONNECTICUT; AND ONE 2548 SQ. FOOT MORE OR LESS PARCEL IN THE TOWN OF NEW LONDON, STATE OF CONNECTICUT; ELIOT HAGAR.

The petitioner Eliot Hagar is the only party in interest otherwise.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (App. A, *infra*, 1 - 39) is reported at 822 F.2d 1261. The opinion of the District Court for the District of Connecticut (App. B, *infra*, 1 - 12) is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit (App. C,

infra) was entered on June 30, 1987. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 45 U.S.C. Sec. 545(d) provides in relevant part:

(d) Acquisition of property; declaration of taking; property compensation; procedure; transfer of title

(1) The Corporation is authorized, to the extent financial resources are available-

.
(B) to acquire any right-of-way, land, or other property (except right-of-way, land, or other property of a railroad or

property of a State or political subdivision thereof or of any other governmental agency), which is required for intercity rail passenger service;

by the exercise of the right of eminent domain, in accordance with the provisions of this subsection, in the district court of the United States for the judicial district in which such property is located or in any such court if a single piece of property is located in more than one judicial district; Provided, That such right may only be exercised when the Corporation cannot acquire such property by contract or is unable to agree with the owner as to the amount of compensation to be paid.

(2) The Corporation shall file with the complaint, or at any time before judgment, a declaration of taking containing or having annexed thereto--

(A) a statement of the public use for which the property is taken;

(B) a description of the property taken sufficient for the identification thereof;

(C) a statement of the estate or interest in the property taken;

(D) a plan showing the property taken; and

(E) a statement of the amount of money estimated by the Corporation to be just compensation for the property taken.

(3) Upon the filing of the declaration of taking and the depositing in the court of the amount of money estimated in such declaration to be just compensation for the property, the property shall be deemed to be condemned and taken for the use of the Corporation.

3. Sec. 48-24 of the Connecticut General Statutes, provides as follows:

Sec. 48-24. Condemning authority to obtain zoning variance for portion of property not taken or take entire unit. A condemning authority, if acquiring less than the total amount of a single unit of contiguous property, shall, if the remaining portion of such property does not conform to the area requirements of existing zoning regulations, obtain a zoning variance for such remaining portion of property from the local zoning board of appeals before condemning any portion of such property. If such variance is not obtained prior to the taking by the condemning authority, the owner or owners of such single unit of contiguous property shall be reimbursed for the total amount of such unit and the condemning authority shall take title in fee simple to the entire unit of contiguous property.

STATEMENT OF THE CASE

1. This is a land condemnation case in which National Railroad Passenger Corporation (hereinafter "Corporation" or "Amtrak") a for profit private corporation, exercising powers granted by Congress under 45 U.S.C. Section 545(d)(1)(B), condemned portions only of two pieces of real property owned by the petitioner, Eliot Hagar.

The statute in its terms permits such condemnation to be exercised only when the Corporation cannot acquire such property by contract or is unable to agree with the owner as to the amount of compensation. The land to be acquired must be that "which is required for intercity rail passenger service." The power is limited and

the jurisdiction question inheres in these limitations. The Corporation is not a governmental agency. 45 U.S.C. Section 541, et seq.

The Corporation purported to act solely under the provisions of the 45 U.S.C. Section 545(d)(1) and the complaint and declaration recite only that the public use for which the property was to be taken was "the realignment and construction of track and a new moveable-span bridge over the Shaw's Cove inlet in New London, Connecticut." In fact, as was later deduced in the discovery process Amtrak had an unpublished, unrecorded, private agreement with the City of New London, Connecticut, and the Federal Railroad Administration to acquire land for a so-called "Service road" for the City of New London.

2. The petitioner, Eliot Hagar first discovered this fact in May 1984, after lengthy and contested discovery when Judge Clarie ordered Amtrak to produce the agreement. Although dated July 1, 1982, the agreement, with the City of New London, in terms of the meeting of the minds, was reached much prior to the taking date of March 18, 1982. The agreement admittedly provides that Amtrak will acquire property for a potential future city service road to run along the realigned track from a point westerly of Shaw's Cove about one mile to the New London railroad station. All of the parcel of 1691 square feet taken from petitioner was taken solely for the City of New London roadway. Of the 2548 square feet parcel taken from petitioner, 1543 square feet were for

the City of New London, 556 square feet were for railroad purposes and 449 square feet were for a temporary easement.

Both parcels remaining to petitioner became non-conforming. None of the appraisers took into account that the land area after the taking became non-conforming. Amtrak had only one appraiser and he neither allowed for the non-conformity nor included it in his "before and after" valuation appraisal, which technically allows for severance damage. On one parcel the remainder was 5953 square feet when the zoning regulations would require 7000 square feet. On the other parcel the remainder became 4364 square feet when the minimum for any use was 5000 square feet in this commercial zone.

3. The City of New London obligated itself to pay \$740,000.00 under the agreement, of which the FRA's share of the cost of acquisition was \$570,100.00 and Amtrak's share was \$169,900.00. The FRA was actually to "provide subgrade preparation, a retaining wall, and drainage necessary for a potential future City service road (the "Service Road")." The project was an extensive one and involved the acquisition of approximately twenty-four parcels of land. At no time was petitioner given notice of any taking for the purposes set forth in the agreement of July 1, 1982.

4. Upon discovery of this private agreement of July 1, 1982, (which had to be compelled by court order), the petitioner as defendant in the

District Court proceedings filed a motion for permission to file an answer contesting the taking, which motion was denied by the magistrate, but permitted by order of the Court. The jurisdiction of the District Court is found under 45 U.S.C. Section 545(d)(1)(B), as set forth supra, providing that the exercise of the right of eminent domain shall be in the district court of the United States for the judicial district in which such property is located. The District Court considered the problem to be one of jurisdiction which could be raised at any time. The petitioner in his answer, as permitted to be filed, raised these subject matter jurisdictional questions of the right of Amtrak to take petitioner's land for a service road for the City of New

London. Petitioner claimed that such a taking was not "required for intercity rail passenger service." Petitioner claimed further in his answer that Amtrak, FRA and the City of New London had wrongfully conspired and confederated to deprive petitioner of his civil rights and specifically his property rights on the partial takings. The petitioner further alleged that Amtrak violated the provisions of 45 U.S.C. Section 547 in that it engaged in and adhered to an action, practice or policy inconsistent with the policies and purposes of the act known as the "Amtrak Improvement Act of 1981." The sole purpose, petitioner alleged, was to exercise the power of eminent domain for speculation, sale and transfer of such condemned lands at an

enhanced value for a service road to become a public highway within the City of New London. Additionally, the petitioner as defendant below filed a counterclaim as part of his answer, asking for affirmative relief from the invalidity of the taking of his two parcels, and for money damages.

Amtrak, after strongly resisting the right of the defendant below to file an answer, controverted the allegations of invalidity in its "reply," a pleading not otherwise permitted under Fed. R.Civ. P. 71A(e), but not objected to by defendant below.

5. Petitioner moved for summary judgment as landowner, believing that his property was wrongfully taken, and that Amtrak lacked jurisdiction or discretion to take

the lands. The petitioner alleged in his motion that there was no genuine issue as to any material fact, and demanded judgment. In Amtrak's answer to interrogatories, (when it was compelled by Court order to comply) by stating specifically its authority for the taking, stated "USCA 45 - 545(d)." This section grants the power solely for those lands "required for intercity rail passenger service." It was admitted that the portions of land hereinbefore described were being acquired for the City of New London. In the appraisal reports prepared by Amtrak's appraiser, Norman Benedict as of January 27, 1981 and as of March 18, 1982 (date of taking), it clearly appears in the earlier 1981 appraisal that it was intended to transfer

petitioner's land to the City of New London "for the purpose of constructing a service road." This same 1981 report actually allocated damages ascribed to the City of New London to be \$6,762.00 while that of Amtrak was to be \$2,538.00. The March 18, 1982 appraisal report made no reference whatsoever to the City of New London and merely stated that Amtrak proposes to acquire 1691 square feet (petitioner's land) of the appraised property in fee. The appraisal reports for both parcels indicate that the purpose for the taking was for a City of New London roadway, with the exception of 556 square feet.

6. Amtrak filed a "cross-motion" for summary judgment and "opposition" to

defendant's motion for summary judgment stating that the "property taken in this action was necessary for and incidental to the provision by the plaintiff of intercity rail passenger service. It was within the taking authority delegated to the plaintiff by Congress." The motion was accompanied by a memorandum of law, but in neither the motion nor the memorandum of law (no affidavits of any persons were submitted) did Amtrak claim in its favor that there was no genuine issue of fact. In the memorandum of law submitted by Amtrak, it refers to the "evidence" as clearly not supporting defendant's contention, based almost exclusively on the permanent easement reserved "as to all lands to be conveyed to the City under

this Agreement" and extending "fifty feet in either direction from the property boundaries of the relocated railroad right-of-way." (Sec. 604 of the July 1, 1982 Agreement).

The purposes of the permanent easement are set forth in the agreement - being largely inspection, maintenance, and repair of adjacent railroad facilities; railroad drainage and utility requirements; and rescue and salvage operations required in connection with a railroad emergency. No showing is made by affidavit of engineers or otherwise to support the necessity of an additional fifty feet of right of way (permanent easement) over what was to be a public highway adjoining the railroad's realigned boundaries. There is only

the general, conclusory statement that it is "clear that the taking at issue here "is required for intercity rail passenger service." (Amtrak Memo, page 11). The Agreement of July 1, 1982, with its appended maps show the Shaw's Cove bridge is several hundred feet southwesterly of petitioner's property, and no claim for an easement of access over petitioner's land for that purpose can legitimately be claimed, contrary to the repeated statements of the respondent. Amtrak admits its lack of "absolute precision" in the declaration of taking, but claims it within the requirement of "a short and plain statement . . . as the use for which property is to be taken," under Fed. R. Civ. P.71 A(2). Amtrak suggests in

its cross-motion for summary judgment that it is a well-established principle that amendments to a Declaration of Taking are permitted to rectify a mistake in the original declaration. No amendment was ever offered.

7. Judge Motley in an unreported opinion dated October 15, 1985, but not filed until February 4, 1986, denied the petitioner's motion for summary judgment, and granted Amtrak's cross-motion for summary judgment, based on the Court's determination that the taking by Amtrak was a legitimate exercise of its delegated authority (App. B., *infra*, pp. 1-12). An appeal to the Court of Appeals for the Second Circuit was dismissed upon motion on May 20, 1986 as premature

and would have to await the completion of the trial on the issue of just compensation. A jury trial ended in a verdict and judgment on July 22, 1986 finding compensation to be \$11,850.00 for one parcel and \$23,150.00 on the second parcel for petitioner. A motion for a new trial was denied by Judge Clarie on September 4, 1986.

On appeal the Court of Appeals for the Second Circuit on June 30, 1987, affirmed the orders granting Amtrak's cross-motion for summary judgment and denying petitioner's motion for a new trial. (App. A, *infra*, pp. 1 - 39).

REASONS FOR GRANTING THE PETITION

The case presents important principles and questions concerning the condemnation process under federal law by a non-governmental agency to whom is delegated a part of the sovereign power of eminent domain, for a special and limited purpose.

1. A private "for profit" corporation, which the Congress of the United States created and endowed with special powers, including the delegation of a portion of the sovereign's power of eminent domain, should not be allowed to evade the limitations on its powers by a simple contractual provision entered into with its "partners" in the development of property. The facts are undisputed that Amtrak did not comply with the

law in taking the petitioner's property. It misrepresented the purpose of the taking as to lands of petitioners. It seeks to save its position by claiming that a contract entered into secretly, and withheld from petitioner, justifies the taking ex post facto because it contains a "shotgun" clause reserving permanent easements over lands it covenanted to acquire for non-related railroad purposes. It is impossible to understand how an agreement such as the July 1, 1982 agreement between Amtrak, the Federal Railroad Administration, and the City of New London, can control let alone affect the statutory power of condemnation granted to Amtrak under 45 U.S.C. 545(d)(1)(B). This statute

authorizes only the acquisition of lands by the power of eminent domain "which is required for intercity rail passenger service."

The harm and dangerous precedent, if the ruling in the case stands, is that it condones a false statement as to the purpose or use to which property is to be taken, made in a judicial proceeding. It encourages the evasion of statutory laws limiting the exercise of the sovereign police power as delegated to a private agency. It permits to be done indirectly what cannot be done directly, an evasive tactic that has long been discountenanced in our law. Austin v. Tennessee, 179 U.S. 343 (1900); Cook v. Marshall County, Iowa, 196 U.S. 261 (1905). The cigarette cases stress

the bona fide principle in judging the application of our laws. Were these schemes to evade the laws, "little better than a burlesque"? Austin, supra at 357, quoting from Commonwealth v. Bishman 138 Penn. St. 639. Bona fide transactions the Austin case held were determinative, and not simply the size of the package. Austin, supra at 359. In this case as in Austin, the consequences of adopting the contentions of Amtrak "would be far-reaching and disastrous." Austin, supra at 360.

Many of the statements in Austin and Cook, supra, seem clearly to apply in this case:

" . . . a discreditable subterfuge, to which this court ought not to lend its countenance." (Austin, supra at 361)

". not a bona fide transaction, but was merely a convenient subterfuge for evading the law " (Cook, supra at 269.

". where the lawfulness or unlawfulness of the act is made an issue the intent of the actor may have a material bearing in characterizing the transaction." (Cook, supra at 271-2).

The evasion of the law in this case is obvious. It is admitted that Amtrak would have no power to take land for the City of New London for any purpose, but as long as there is a reservation of a "permanent easement " over lands acquired, then it is permissible. But the petitioner was not allowed to contest the bona fide quality of this reservation. Any examination of the physical facts as shown in the maps on file will show that such "permanent easement" is a

sham as to petitioner's property. The land adjoining the two track line is open and separated from the rail lines by a chain link fence the entire distance. It is known that repair, maintenance, and inspection of the rail lines are done mostly from the tracks themselves. It has not been shown that in the one hundred and thirty years of its existence, the railroad has needed any additional land for its tracks in New London. The line was laid out in 1851 under charter from the State of Connecticut as a single track railroad and in 1892 the plaintiff constructed another track. New York, N.H. & H.R. Co. v. Armstrong et al. 92 Conn. 349, 102 A.791, 793. The charter permitted a layout of a single, double or treble railroad "not exceeding six rods wide through the

whole length." Id, at 794. This case also found that the only acts of possession were the location of first one and then another track and its building of a trestle over Shaw's Cove. The railroad never defined its right of way except by such possession. Id, at 795.

The tracks in New London are still only double tracks. It can hardly be held as a matter of law that the railroad requires an easement fifty (50) feet on either side of the railroad boundaries. If an easement were necessary or required for intercity rail passenger service, why not acquire only an easement? The City of New London certainly has the power of eminent domain to acquire lands for public highways. The real

purpose, therefore, to having Amtrak acquire the land was to evade the state law, Connecticut General Statutes, Sec. 48-24, to which the City of New London was clearly bound. It requires any condemning authority in a partial taking, if the remainder is rendered non-conforming as to area requirements, to obtain a zoning variance "before condemning any portion of such property." (emphasis added).

The harm resulting to petitioner has been a violation of his Fifth Amendment rights to due process and just compensation. He is left with properties that are now illegally used, since they do not have a variance and are non-conforming as to lot area and parking requirements.

The variances, however, would still leave petitioner with a legal, but nevertheless a non-conforming use. He cannot expand the use, change or alter the use, or rebuild if destroyed more than half.

2. In fact, New London is not even an "end point" between which service by the railroad must be provided and Amtrak has no statutory obligation to continue service. Wood v. National Railroad Passenger Corp., 341 F.Supp. 908, 913, 914. The decisions below seem to rely very heavily on the public purpose of providing rail service, but there is no finding of fact elicited upon a trial at which petitioner could adduce evidence. Judge Motley in effect raised a question of fact in considering a summary judgment motion, decided the

fact, and granted summary judgment thereon, i.e., the permanent easement reserved would "clearly facilitate the provisions of intercity rail passenger service." (App. B, infra, p. 7) (emphasis added). Again, Judge Motley in granting summary judgment in favor of Amtrak made a factual determination that the agreement of July 1, 1982 was part of the condemnation proceedings, when in point of fact it was not a part of the condemnation complaint, declaration of taking, or statement of purpose required under the statute and under the rules of procedure.

There was no finding in the summary judgment opinion that there was no genuine issue of fact for trial. The Court of Appeals did not so find in affirming Judge Motley's granting of

summary judgment in favor of Amtrak. The Court of Appeals merely states that it was "persuaded that Amtrak did not exceed its statutory authority in the instant case." (App. A, infra p. 19). The petitioner was deprived of a right to try this issue of fact, when on the face of the taking there was no indication of the real purpose of the taking. The Court of Appeals made a fact determination and concluded the petitioner from proving his allegations that the service road was not required for intercity rail passenger service, and that the reservation of an easement was a sham. The Court of Appeals found as a fact that the service road was required for intercity rail passenger service, and that the grant of the

easement, "demonstrates the significant relationship between the condemned property and the provision of intercity rail passenger service." (App. A, *infra*, p. 21). Nowhere does the Court of Appeals find that summary judgment was justified under the principles enunciated in Celotex Corporation, Petitioner v. Catrett, 477 U.S. , 91 L.Ed. 2d 265, 106 S.Ct. (1986).

The pleadings, the extensive discovery process, subjected as it was to repeated objections and the issuance of orders compelling answers, all show a great variety of factual issues between the parties. The moving party, if taken to be Amtrak, itself raised several factual questions, misleading the court into

making a fact determination in each case, i.e., that in fact an easement was reserved over petitioner's land, that in fact this easement was required for intercity rail passenger service, and so on. The requirement for summary judgment is that specific facts be produced by the non-moving party showing that there is a genuine issue for trial. Celotex Corp, supra 91 L.Ed. 2d at 274. This the petitioner certainly did by his numerous interrogatories to which the answers showed that there were genuine issues for trial.

In effect the petitioner has been deprived of his day in court on these factual issues and nowhere is it expressly found by the trial or appellate court that there was no

genuine issue of fact between the parties justifying a summary judgment.

3. The conflict between the Second Circuit and the Fifth Circuit over the application of state law in the trial on just compensation lies in the fact that although the Second Circuit followed Georgia Power v. Sanders, 617 F.2d 1112 (5th Circ. 1980) (in banc) in Winooski Hydroelectric Co. v. Five Acres of Land, 769 F.2d 79 (2d Cir. 1985); in the petitioner's case the Second Circuit found the principle not applicable so as to require Amtrak to comply with the State Statute, Conn. Gen. Stat. Sec. 48-24. The Second Circuit agrees that state laws should apply unless (where no legislative intent to the contrary) the state law conflicts significantly with any

federal interests or policies present in the case under scrutiny. A conflict, the Court agrees, exists where the effect of the state law is virtually to nullify the federal objectives. (App. A., *infra*, p. 29). The other less forceful consideration is whether arguably the state law would interfere with an identifiable federal policy or interest, but not amount to a conflict, whereupon the Court must proceed to an examination of the relative strength of the State's interest in having its rules applied (App. A., *infra* p. 30).

With these principles in mind it is difficult to justify the affirmation of summary judgment by the Second Circuit in this case. The Second Circuit opinion states it is

"hesitant" to say application of Connecticut law would nullify achievement of federal objectives, but states, "we are convinced that it would subject Amtrak to uncertainties and delays in the exercise of its condemnation power, thereby seriously interfering with "administration of the federal intercity rail passenger service program." (App. A, infra, p. 30).

These are without doubt factual considerations relied upon by Amtrak to justify its taking. The Second Circuit erroneously adopted facts in dispute and made a finding of fact ("convinced") in a summary judgment consideration. On principle this is wrong and seriously prejudices petitioner, depriving him of a right

to a trial on this issue of fact, an evidentiary hearing, and not a summary determination by the Court. The Second Circuit cites the "national goals" of energy conservation and self-sufficiency and the national mandate for Amtrak. These considerations should have little bearing and do not justify the taking as a matter of law when Amtrak did not purport to act under its national goal line, but solely under 45 U.S.C. Section 545(d)(1)(B). The Second Circuit opinion further finds that the application of state law would "actually frustrate" federal objectives. (App. A, *infra* p. 35). Again, this is a factual issue which should be heard in trial proceedings. On principle, it is difficult to

perceive, any rationale for the Second Circuit's opinion in this respect, because certainly the sovereign power of the State of Connecticut, which is subject to the Statute has felt no frustration and no conflict with its objectives in exercising the power of eminent domain. Why the Second Circuit considers Amtrak more solicitously than the sovereign power of the State of Connecticut is incomprehensible. Under federal law the property owner cannot be left with an uneconomic remnant, a principle fully applicable in this case, but denied to petitioner by summary judgment.

CONCLUSION

For all of the foregoing reasons and for the judicial fairness implicit in a trial of the factual issue of whether an abuse of power exists in this case, a writ of certiorari should be granted.

Respectfully submitted

Joseph E. Moukawsher
Attorney for Petitioner

September, 1987



DECISION AND OPINION OF THE
COURT OF APPEALS FOR THE
SECOND CIRCUIT (822 F.2D 1261)

NO. 667-August Term, 1986

(Argued: 1/26/87 Decided: 6/30/87)

NATIONAL RAILROAD PASSENGER
CORPORATION,
A District Of Columbia Corporation

TWO PARCELS OF LAND: ONE 1691 SQ. FOOT MORE OR LESS PARCEL OF LAND IN THE TOWN OF NEW LONDON, COUNTY OF NEW LONDON AND STATE OF CONNECTICUT; AND ONE 2548 SQ. FOOT MORE OR LESS PARCEL IN THE TOWN OF NEW LONDON, STATE OF CONNECTICUT; ELIOT HAGAR,

ELIOT HAGAR,

Defendant-Appellant.

OAKES, MESKILL AND MAHONEY,

CIRCUIT JUDGES,

Appeal from an order of the United States District Court for the District of Connecticut (Motley, Chief Judge, sitting by designation) granting National Railroad Passenger Corporation's cross-motion for summary judgment in its action to condemn defendant's property and denying Hagar's motion for summary judgment, and from an order of the same court (Clarie, Judge) denying defendant's motion for a new trial.

Affirmed.

EMMET L. COSGROVE (Waller, Smith & Palmer, P.C., New London, CT, of counsel), for Plaintiff-Appellee.

JOSEPH E. MOUKAWSHER, New London, CT, for Defendant-Appellant.

MAHONEY, Circuit Judge:

In this condemnation action, Eliot Hagar, a New London landowner, appeals from (1) an order of the United States District Court for the District of Connecticut (Constance Baker Motley, Chief Judge, sitting by designation) denying Hagar's motion for summary judgment and granting plaintiff National Railroad Passenger Corporation's cross-motion for summary judgment on the issue of whether plaintiff was authorized to condemn Hagar's property; and (2) an order of the same court (T. Emmet Clarie, Judge) denying Hagar's motion for a new trial premised upon the ground that (a) the court erred in refusing to apply state law in resolving the question of just compensation, and (b) the jury returned a quotient verdict.

We affirm.

BACKGROUND

At all relevant times, defendant Hagar was the owner of two parcels of realty located in the City of New London, Connecticut. Both are separated from the nearby Thames River by the railroad tracks of the National Railroad Passenger Corporation ("Amtrak"). The parcels are improved by buildings.

On March 18, 1982, Amtrak filed a declaration of taking and complaint in the United States District Court for the District of Connecticut seeking to condemn portions of Hagar's properties as part of a plan aimed at "realignment and construction of track and construction of a new moveable-

span bridge over the Shaws Cove outlet in New London." Brief of Amtrak at 1. Hagar's properties were but two of several sought by Amtrak.

In the course of discovery, Hagar was permitted to examine an agreement dated July 1, 1982 among the Federal Railroad Administration ("FRA"), the City of New London and Amtrak (the "Agreement"). The Agreement set forth the rights and responsibilities of the parties respecting a "joint hurricane protection barrier/railroad embankment project." Section 202 of the Agreement required Amtrak to "take all actions necessary, in cooperation with FRA, whether by negotiated purchase or by condemnation, to acquire the property interests that are required for the Joint and Bridge Projects."

Section 301 of the Agreement required Amtrak, within specified time constraints, to "convey to the City [of New London], by quitclaim deed, all of Amtrak's right, title and interest in (1) certain portions of the parcels acquired under section 202" Section 501 provided that "[t]he City intends to construct [a] Service Road following conveyance to the City of all properties to be conveyed to the City for the Service Road under Article III [including section 301]"

Amtrak reserved certain rights in the conveyances. For example, under section 604 of the Agreement, New London granted Amtrak a permanent easement

to all lands to be conveyed to the City under this Agreement, and also to all lands now held or hereafter acquired by the City between Shaw's Cove and Captain's Walk and extending fifty feet in either direction from the property boundaries of the relocated railroad right-of-way, for the following purposes:

- (a) inspection, maintenance and repair of adjacent railroad facilities;
- (b) inspection, maintenance and repair of the hurricane protection barrier as it may affect railroad facilities and operations;
- (c) railroad drainage and utility requirements;
- (d) rescue and salvage operations required in connection with a railroad emergency; and

(e) open, uninterrupted, and continuous pedestrian and automobile access to and egress from Amtrak's Shaw's Cove Bridge by Amtrak operation and maintenance personnel. Amtrak shall only exercise such rights at reasonable times and in a reasonable manner, and only after reasonable prior notice to, and acknowledgment of receipt by, the City; except that no such prior notice shall be required in connection with routine bridge tender access to and egress from the Shaw's Cove Bridge. Except as otherwise expressly provided, any exercise of the rights described in this section shall be at Amtrak's sole expense. The rights granted by the City under this section shall

not be construed as a waiver of any permit requirements imposed by local laws. Although Amtrak's complaint in condemnation purported to seek Hagar's properties "to accomplish the realignment and construction of track and a new moveable-span bridge," the exhibits to the complaint described the subject properties as part of a "Service Road Acquisition."

Based on the complaint and Agreement, Hagar surmised that Amtrak was condemning property

for the purpose of reconveying it to the City and the City would construct a public street approximately one mile long behind the buildings on Bank Street and running parallel to

the railroad right of way. The purpose of the road was to provide access to the rear of the buildings on Bank Street, to relieve traffic on Bank Street, and to provide greater access to water front dock facilities in the area.

Brief of Hagar at 5-6.

On August 21, 1985, Hagar moved for summary judgment, claiming that since Amtrak sought to condemn his land for the purpose of conveying it to New London for the latter's use as a public street, it exceeded its power of eminent domain under 45 U.S.C. Section 545(d) (1982). Amtrak cross-moved for summary judgement. In an unreported

memorandum opinion dated October 15, 1985, Chief Judge Motley denied Hagar's motion and granted Amtrak's cross-motion, holding that (1) Amtrak enjoys broad discretion in the exercise of its eminent domain power and a "valid exercise of discretion by a governmental body" should not be disturbed by the judiciary unless the official action is patently unreasonable; and (2) Amtrak's proposed conveyance of condemned properties to New London would constitute a "subordinate use, since the majority of the property condemned by Amtrak will be used for the construction of the tracks and moveable span bridge." Hagar attempted an appeal of Chief Judge Motley's order, but the appeal was

dismissed as premature by another panel of this court.

The matter proceeded to a trial by jury before Judge Clarie on the issue of just compensation. Amtrak's partial taking of Hagar's property rendered the balance of both parcels nonconforming under New London zoning laws. Conn. Gen. Stat. Sec. 48-24 (1987) requires a condemnor whose partial taking renders remaining property nonconforming to obtain a variance for the remainder prior to condemnation, or to compensate the owner for the entire parcel.¹ Hagar urged application of Section 48-24;

¹ Conn. Gen. Stat. Section 48-24 (1987) provides:

A condemning authority, if

since Amtrak had not obtained variances, Hagar argued that the measure of just compensation was the entire value of his parcels. Judge Clarie rejected the argument and applied federal law, which contains no requirement similar to section 48-24.

The jury awarded Hagar \$11,850 and \$23,150 for the portions of the parcels taken by Amtrak. Hagar moved

acquiring less than the total amount of a single unit of contiguous property, shall, if the remaining portion of such property does not conform to the area requirements of existing zoning regulations, obtain a zoning variance for such remaining portion of property from the local zoning board of appeals before condemning any portion of such property. If such variance is not obtained prior to the taking by the condemning authority, the owner or owners of such single unit of contiguous property shall be reimbursed for the total amount of such unit and the condemning authority shall take title in fee simple to the entire unit of contiguous property.

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for a new trial on the grounds that a "quotient verdict" was rendered by the jury, and that the court had erred on its instructions to the jury regarding the applicability of Connecticut law. The motion was denied and appeal was taken to this court.

DISCUSSION

A. The Legality of the Taking

45 U.S.C. Section 545(d)(1)(B)(1982)

authorizes Amtrak

to acquire any right-of-way, land, or other property (except right-of-way, land, or other property of a railroad or property of a State or political subdivision thereof or of any other governmental agency), which is required [for] intercity rail passenger service[] by the exercise of the right of eminent domain

Chief Judge Motley granted Amtrak's cross-motion for summary judgment on the ground that its conveyance to New London for "construction and maintenance of the service road by the

municipality" was a "valid exercise of discretion by a governmental body." Accordingly, citing and quoting *United States v. 49.79 Acres of Land*, 582 F. Supp. 368 (D.Del. 1983), Chief Judge Motley concluded that she should not disturb the decision unless "the delegated official so overstep[s] his authority that no reasonable man could conclude that the land sought to be condemned had some association with the authorized project." *Id.* at 373 (quoting *United States v. 2,606.84 Acres of Land*, 432 F.2d 1286, 1290 (5th Cir. 1970)) (emphasis added in *United States v. 49.79 Acres of Land*).

We agree with Hagar that the district court applied the wrong standard in reviewing Amtrak's condemnation in this case. Amtrak is

not a "governmental body"; it is the creature of a statute which specifically provides that Amtrak shall not be an agency or establishment of the federal government.² Amtrak has not been

2 45 U.S.C. Section 541 (1982) provides in pertinent part that Amtrak shall be operated and managed as a for profit corporation, the purpose of which shall be to provide intercity and commuter rail passenger service The Corporation [Amtrak] will not be an agency or establishment of the United States Government. It shall be subject to the provisions of this chapter and, to the extent consistent with this chapter, to the District of Columbia Business Corporation Act . . .

authorized to exercise the sovereign's power of eminent domain. It has been granted a limited power, within the meaning of *United States v. Carmack*, 329 U.S. 230 (1946),³ to condemn land "required [for] intercity rail

3. There, the Supreme Court stated:

In the instant case, we deal with broad language employed to authorize officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself. This is a general authorization which carries with it the sovereign's full powers except such as are excluded expressly or by necessary implication. A distinction exists, however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers.

329 U.S. at 243 n.13.

passenger service." 45 U.S.C. Section 545(d)(1)(B)(1982).⁴

Although Amtrak's exercise of its delegated power of eminent domain is entitled to less deferential review than that of a government agency, we are persuaded that Amtrak did not exceed its statutory authority in the instant case. In addition to authorizing Amtrak to acquire land by eminent domain which is "required

4. Compare the broad language of 40 U.S.C. Section 257 (1982), which provides in part:

In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so

[for] intercity rail passenger service," 45 U.S.C. Section 545(d)(1)(B)(1982), Congress has established a number of goals for Amtrak, including the "[e]xercise of [Amtrak's] best business judgment in taking actions to minimize Federal subsidies," 45 U.S.C. Section 501a(1)(1982), and "[e]ncouragement of State, regional, and local governments and the private sector to share the costs of operating rail passenger service, including the costs of operating stations and other facilities, in order to minimize Federal subsidies," 45 U.S.C. Section 501a(2) (1982). Recognizing this, Hagar does not contend that Amtrak may not condemn property for a service road; he contends that it may not do so for the

City of New London. Reply Brief of Hagar at 3.

On the facts of this case, we disagree. We see no impropriety in Amtrak's condemnation of property within the scheme of an overall cooperative agreement with New London and the FRA whereby the service road, the need for which is unchallenged, is maintained by New London. New London's grant of a permanent easement to Amtrak for inspection/maintenance purposes, the exercise of which may periodically close the road to the public, demonstrates the significant relationship between the condemned property and the provision of intercity rail passenger service. On this basis, we affirm the district court's grant of Amtrak's cross-motion

for summary judgment. See *Sadlowski v. United Steelworkers of America*, 645 F.2d 1114, 1120 (D.C. Cir. 1981), rev'd on other grounds, 457 U.S. 102 (1982) (appellate court may uphold summary judgment under legal theory different from that applied by trial court); 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* Section 2716, at 657-60 (1983) (same).

B. The Measure of Just Compensation

Both parties are in agreement that, in general, federal law governs this federal condemnation action. See Brief for Hagar at 28; Brief of Amtrak at 17-18. Amtrak derives its powers from federal law; it was created to "fully develop the potential of modern rail service in meeting the Nation's innercity and commuter passenger

transportation requirements." 45
U.S.C. Section 541 (1982). Although,
as noted above, Amtrak is a
corporation and not an agency or
establishment of the federal
government, many details of its
corporate governance are prescribed by
federal law;⁵ it is subject to the
District of Columbia Business
Corporation Act only where consistent
with federal law. See Id. Thus,
since Amtrak derives its authority
from a "specific Act[] of Congress
passed in the exercise of a
'constitutional function or power,'"

5. See, e.g., 45 U.S.C. Section 542
(incorporation); id. Section 543
(qualifications and appointment
of directors and officers;
bylaws; stock conversion and
voting rights); id. Section 544
(general provisions respecting
common and preferred stock).

United States v. Kimbell Foods, Inc.,
440 U.S. 715, 726 (1979) (quoting
Clearfield Trust Co. v. United States,
318 U.S. 363, 366 (1943)), here the
power to regulate commerce among the
several States, we think it clear that
"federal interests are sufficiently
implicated to warrant the protection
of federal law." Id. at 727 (footnote
omitted).

While federal law governs Amtrak's
rights and obligations in the exercise
of its eminent domain power, it is
silent respecting the measure of just
compensation. Thus, the question
arises whether the issue of
compensation should be resolved
according to a uniform federal rule or
whether state law should supply the

rule of decision.⁶ Here the parties part company. Hagar argues that Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir. 1980) (in banc), followed by this circuit in Winooski Hydroelectric Co. v. Five Acres of Land, 769 F.2d 79 (2d Cir. 1985), requires application of Conn. Gen. Stat. Section 48-24 (1987) to the question of just compensation. While we agree that the Georgia Power analysis is sound and should be applied to the facts of this case, we think it points to a different result.

6 Amtrak contends that Hagar waived his argument respecting the applicability of state law by failing to raise it in his answer. We disagree. Fed. R.C. Civ. P.71A(e) provides for waiver of "objection[s] or defense[s] to the taking of [a landowner's] property" which are not raised in his answer. Id. (emphasis added).

Georgia Power was a condemnation action instituted under Section 21 of the Federal Power Act ("FPA"), 16 U.S.C. Section 814 (1982), by a private utility acting as a licensee of the Federal Energy Regulatory Commission. The landowner's request that the amount of compensation due them be determined in conformity with Georgia law -- which would have

Urging the applicability of a state rule of compensation cannot properly be characterized as an objection or defense to a taking; at the point in a condemnation proceeding where the issue of compensation arises, the taking is no longer an issue. Furthermore, Rule 71A(e) allows a landowner to "present evidence as to the amount of compensation to be paid" at the trial of the issue of just compensation "whether or not he has previously appeared or answered." *Id.* In *Government of Virgin Islands v. 19.623 Acres of Land*, 536 F.2d 566 (3d Cir. 1976), cited in

resulted in higher awards than would be the case if federal law were applied--were denied by the district court. Id. at 1114-15. The in banc panel held that the source of law under 16 U.S.C. Section 814 is federal, but Georgia law should be adopted as the federal rule of decision. The Fifth Circuit stated as a general rule that considerations of

Amtrak's brief, the court noted that [t]he amount to be paid, which generally does not impinge upon the public interest in a quick resolution of the government's right to condemn the land, is determined only in the second stage of the procedure . . . This is wholly unlike the procedure during the first stage, when all defenses and objections must be carefully preserved.

federalism militate in favor of adopting state law as the federal rule of decision "unless there is an expression of legislative intent to the contrary, or, failing that, a showing that the state law conflicts significantly with any federal interests or policies" present in the case under scrutiny. Id. at 1116 (citing the Rules of Decision Act, 28 U.S.C. Section 1652 (1982), and Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966)). Concluding that no significant federal interest called

Id. at 569, See also 12 C. Wright & A. Miller, Federal Practice and Procedure Section 3048 (1973) ("The only function of the answer is to contest the right of the government to take the land All defenses and objections not so presented [i.e., in the answer], except as to the amount of compensation, are waived.").

for a uniform federal rule as, to the amount of compensation to be paid where property is condemned pursuant to 16 U.S.C. Section 814, the Fifth Circuit held that local law should be adopted as the federal rule on this question.

Here, the governing statute and its accompanying legislative history are silent. We must therefore inquire whether a significant conflict would exist were Connecticut law applied to determine the measure of compensation due landowners following condemnation under 45 U.S.C. Section 545(d). A conflict is demonstrated where "the effect of applying state law is virtually to nullify the federal objectives." *Georgia Power*, 617 F.2d at 1118. Further, "[i]f application

of state law would arguably interfere with an identifiable federal policy or interest, but not amount to a conflict which would preclude application of state law, [the court] must proceed to an examination of the relative strength of the state's interests in having its rules applied." Id.

While we are hesitant to say that application of Connecticut law would nullify achievement of federal objectives, we are convinced that it would subject Amtrak to uncertainties and delays in the exercise of its condemnation power, thereby seriously interfering with "administration of the federal intercity rail passenger service program." Brief of Amtrak at 21. The facts before the Fifth Circuit in Georgia Power are easily

distinguishable and reinforce our conclusion in the instant case. The FPA requires the Federal Energy Regulatory Commission to disapprove applications for projects effecting "the development of any water sources for public purposes [that] should be undertaken by the United States itself." 16 U.S.C. Section 800(b) (1982). Therefore, as the Fifth Circuit noted, an authorized project requiring a licensee to condemn private property is one which "does not implicate the interests of the United States to the degree that it is thought desirable that the project be undertaken by the United States itself." 617 F.2d at 1118. The FPA licensee acts frequently "on a local scale," in contrast to the United

States, which "acts [under the FPA] in the public interest on a national scale." Public Utility District No. 1 v. City of Seattle, 382 F.2d 666, 669 (9th Cir. 1967), cert. dismissed, 396 U.S. 803 (1969).

It is obvious that Amtrak occupies a position quite different from that of a licensee under the FPA. Congress has specifically found that "modern, efficient commuter rail passenger service is important to the viability and well-being of major urban areas and to the national goals of energy conservation and self-sufficiency," 45 U.S.C. Section 501(c)(1) (1982). Amtrak was created to serve national needs. It is "by its Congressional mandate and authorization national in scope. The railroad's lines and

services do not confine themselves to state or county lines but traverse the entire continental United States
." Brief of Amtrak at 19.

In Georgia Power, moreover, resolving the question of compensation according to state law resulted solely in higher condemnation costs to FPA licensees. That would not be the case here. Under Connecticut law, a partial taking rendering excess property nonconforming under local zoning laws requires the condemnor to apply for a variance prior to the taking; failing that, the condemnor is to reimburse the owner for the entire parcel and take title in fee simple thereto. We agree with plaintiff that application of the state rule of compensation here would place Amtrak

in the unenviable position of having either to enmesh itself in the variance procedures of each locality in Connecticut where property is sought to be condemned, or to pay for entire parcels irrespective of the nexus between the property so taken and the project necessitating condemnation. Inasmuch as Amtrak is authorized only to condemn property required for intercity rail passenger service, see 45 U.S.C. Section 545(d)(1)(B), the latter alternative under Connecticut law conflicts with an express statutory limit on Amtrak's eminent domain power.

We recognize, as did Georgia Power, that a state generally has an interest in "avoiding displacement of its laws in the area of property rights," *id.*

at 1123; and that since state law usually governs "the question of what constitutes property," *id.*, the value of property rights is ordinarily best determined according to state law as well. Here, however, the federal interests supporting Amtrak's mission are identifiable and strong and the application of state law would "actually frustrate" federal objectives, *Georgia Power*, 617 F.2d at 1120; we accordingly hold that the district court correctly denied Hagar's motion for a new trial on this ground.

In any event, finally, the district court instructed the jury to determine Hagar's compensation based on the difference between the fair market values of his property before and

after the taking. The jury was also instructed on severance damages; i.e., it was told to take into account the diminution in the fair market value of the property not taken attributable to the severance, and its attention was specifically directed to the zoning regulations under which Hagar's property was rendered non-conforming. The district court instructed the jury that it "must consider the effect of the zoning regulations as a factor affecting value, which any willing buyer and seller would consider in assessing the value of the properties taken." It therefore appears that Hagar has suffered no uncompensated loss.

C. The Quotient Verdict

Hagar contends that the jury rendered an improper quotient verdict; i.e., that the verdict was "plainly reached after insufficient consideration of the question of just compensation, by the simple mathematical means of averaging the expert appraisals offered in the case[]." Brief of Appellant at 36-37.

During the trial on just compensation, the jury heard testimony from Hagar and his real estate appraiser. Hagar also called a New London zoning official to testify respecting the nonconformance of his properties following the taking. Amtrak presented its own real estate appraiser. The jury requested and was granted a chance to view the condemned

properties. The jury began its deliberations late in the afternoon of July 14, 1986; it reconvened the next day and spent one hour and forty-five minutes continuing its deliberations before rendering its verdict.

Even assuming that Hagar's jury returned a quotient verdict, Hagar's motion for a new trial was properly denied on this point. The true quotient verdict is frowned upon because it betrays a complete absence of jury deliberation on the matter of an injured party's compensation. But it must be shown, for example, that the jury agreed in advance to be bound by the result of its arithmetic. See *Myra Foundation v. United States*, 267 F.2d 612, 617 (8th Cir. 1959). A quotient verdict is not objectionable

if, after it is determined, the jurors deliberate further and accept the result as just. See 6A J. Moore, Moore's Federal Practice Section 59.08[4], at 59-114 n.16 (2d ed. 1986). Under these standards, Hagar asserts, but makes no showing of, impropriety.

CONCLUSION

The orders granting plaintiff's cross-motion for summary judgment and denying defendant's motion for a new trial are affirmed.



APPENDIX B

DECISION AND OPINION OF THE
DISTRICT COURT FOR THE DISTRICT
OF CONNECTICUT. (MOTLEY, J.)
(unreported) (Filed February 4, 1986)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NATIONAL RAILROAD PASSENGER
CORPORATION,
A District of Columbia Corporation

-against-

H82-293

TWO PARCELS OF LAND: ONE 1691 SQ. FOOT
MORE OR LESS PARCEL OF LAND IN THE
TOWN OF NEW LONDON, COUNTY OF NEW
LONDON AND STATE OF CONNECTICUT; AND
ONE 2548 SQ. FOOT MORE OR LESS PARCEL
IN THE TOWN OF NEW LONDON, STATE OF
CONNECTICUT; ELIOT HAGAR, ET AL.

APPEARANCES

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MEMORANDUM OPINION

This is a condemnation action in which plaintiff, National Railroad Passenger Association (sic) [hereinafter "Amtrak"], seeks to acquire title to two parcels of land by eminent domain from defendant, Eliot Hagar. The case is now before the court on defendant's motion for summary judgment, pursuant to Fed. R. Civ. P. 56(b), on the grounds that the plaintiff lacked the authority to acquire property for sale to the City of New London and on plaintiff's cross-motion for summary judgment on its complaint.

FACTS

Plaintiff, Amtrak, brought this condemnation action in March of 1982 in order to acquire two parcels of land by eminent domain in connection

with its Northeast Corridor Improvement Project [NCIP]. The complaint stated that the property would be used to construct tracks and a moveable span bridge.

On July 1, 1982, subsequent to the filing of this action, plaintiffs entered into a Joint Agreement with the Federal Railroad Administration and the City of New London, Connecticut to coordinate activities along the waterfront of New London. Under the terms of the agreement, Amtrak was to convey the two parcels at issue in this action to the City of New London for the construction of a service road. The same agreement granted Amtrak a permanent easement across the property to be conveyed to the City for the purpose of:

- a) inspection, maintenance and repair of adjacent facilities
- b) railroad drainage and utility requirements
- c) open, uninterrupted, and continuous pedestrian and automobile access to and egress from Amtrak's Shaw's Cove Bridge by Amtrak operation and maintenance personnel

(Joint Agreement, Section 604, paragraphs (a), (c), and (e), respectively).

The defendant contends that he is entitled to summary judgment in this action based on two grounds. First, the defendant argues that the plaintiff, Amtrak, was without authority under 45 U.S.C. Section

545(d)(1) to take property for conveyance to the City of New London. Secondly, the defendant argues that the federal court was without subject matter jurisdiction under 45 U.S.C. section 545(d) to hear an action involving a taking for the benefit of the City of New London.

DISCUSSION

The defendant bases his motion for summary judgment, in part, on the grounds that Amtrak exceeded the authority granted to it under 45 U.S.C. section 545 in taking property for conveyance to the City of New London. The defendant argues that this taking is outside the scope of the statute.

Under 45 U.S.C. section 545(a), the corporation is authorized to "own, manage, operate, or contract for the operation of intercity and commuter trains . . . and to acquire by construction, purchase, or gift, or to contract for the use of physical facilities, equipment, and devices necessary to rail passenger service."

This broad grant evidences Congress' intent that Amtrak have the discretion to determine which measures are required to achieve the goal of providing efficient rail passenger service.

45 U.S.C. section 545(d)(1)(B) provides that Amtrak may acquire property by eminent domain if it is "required for intercity rail passenger service." When this section is read in conjunction with 545(a), it becomes

clear that Amtrak has the discretion to determine which property is "required."

Defendants argue that a city service road is not required for rail service. The agreement which provided for the conveyance to New London, however, also provides Amtrak with a permanent easement across the property for purposes which clearly facilitate the provision of intercity rail passenger service, i.e., maintenance and repair of Amtrak facilities and access to Amtrak facilities, by both Amtrak personnel and Amtrak customers (Joint Agreement between F.R.A., Amtrak, and City of New London, s.604).

It is certainly within its grant of discretionary power for Amtrak to determine that construction and

maintenance of the service road by the municipality would be the most efficient way to proceed. In the face of a valid exercise of discretion by a governmental body, the judiciary should not disturb the decision unless "the delegated official so oversteps his authority that no reasonable man could conclude that the land sought to be condemned had some association with the authorized project." United States v. 49.79 Acres of Land, 582 F.Supp. 368 (D. Del. 1983), quoting United States v. 2,606.84 Acres of Land, 432 F.2d 1286, 1290 (5th Circ. 1970).

The only other argument available to the defendant to invalidate the taking is that the conveyance does not further a public purpose. However,

even if the defendants are correct in their contention that a taking for the city of New London is not solely for the public purpose of providing intercity rail passenger service, an incidental non-public use would not invalidate the taking. In Swan Lake Hunting Club v. United States, 381 F.2d 238 (5th Cir. 1967), the Fifth Circuit held that the fact that part of the condemned property was to be used for an arguably "private use" did not invalidate the taking, provided that the private use was subordinate to the public purpose, accord, Lake Charles Harbor & Terminal District v. Henning, 409 F.2d 932 (5th Cir. 1969). In the instant case, the conveyance to New London constitutes a subordinate use, since the majority of

the property condemned by Amtrak will be used for the construction of the tracks and moveable span bridge.

In the instant case the property is not being conveyed to a private landowner but rather to a municipality that is granting permanent easements across that property in furtherance of the public purpose of providing rail service. Thus, the argument that this taking is for a nonpublic purpose holds little merit.

Defendant's remaining argument for dismissing the case is that this court lacked subject matter jurisdiction. The merit of that argument depends upon a finding that the taking was beyond the scope of Amtrak's delegated authority. Since it is clear that the condemnation by Amtrak was a valid

exercise of its delegated power, this court has jurisdiction pursuant to 45 U.S.C. section 545(d)(1)(B), which provides that to exercise its power of eminent domain, Amtrak should commence an action "in the district court of the United States for the judicial district in which such property is located . . . "

In light of the fact that this court has determined that the taking of Amtrak was a legitimate exercise of its delegated authority, the defendant's motion for summary judgment is hereby denied, and the plaintiff's cross-motion for summary judgment on its complaint is hereby granted. Submit order within ten days on five days notice.

Dated: New York, New York

October 15, 1985

/s/ Constance Baker Motley
HON CONSTANCE BAKER MOTLEY
Sitting by Designation

APPENDIX C

JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
CONNECTICUT ENTERED JULY 22, 1986;
AFFIRMED BY THE COURT OF APPEALS FOR
THE SECOND CIRCUIT ON JUNE 30, 1987

UNITED STATES DISTRICT COURT
CONNECTICUT

NATIONAL RAILROAD PASSENGER CORP.

V. CIVIL H-82-293 TEC

TWO PARCELS OF LAND IN NEW
LONDON, CT., ET AL

T. EMMET CLARIE

Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

Judgment be and is hereby entered in favor of the defendant Eliot Hager (sic) as to the parcel of land located at the rear of 60-66 Bank St., New London, Conn. in the amount of \$11,850.00 and as to parcel of land located at the rear of 136 - 140 Bank St., New London, Conn. in the amount of \$23,150.00.

July 22, 1986